

## SECTION G - PROCUREMENT

### 1. OVERVIEW

This section provides an overview of federal and state laws that govern competitive bidding as it relates to the solicitation of bids or requests for proposals and the awarding of contracts for professional services and for construction, alteration or rehabilitation of public works, public facilities and some housing projects. Projects are governed by laws designed to ensure that:

All jurisdictions requiring the services of professional engineers or architects must, prior to engaging their services, adopt a bidding process which involves publishing a request for proposal (RFP). The jurisdiction may procure professional services for the specific project or procurement may be done for professional services in general (In this case requirements should be broad enough to encompass different types of projects and the contract term cannot extend more than five years.). All grantees must be able to provide the State CDBG office with proof of publication, contracts and RFP's on request and have copies of the same available in their files. When advertising for professional services, cities must advertise at least twice in a newspaper of general circulation and counties must advertise once a week for a period of at least three weeks in a newspaper of general circulation. See exhibit G-1 for advertisement for engineer/architect requesting a bid for a single project only. See exhibit G-2 for advertisement for general engineering/architectural services (recommended).

All jurisdictions must award construction and vendor contracts to the lowest responsible bidder.

Minority contractors/subcontractors, low and very low-income people are to be provided opportunities to contract for and perform work assisted by CDBG funds.

Grantees shall use their own procurement procedures which reflect applicable state and local laws and regulations, provided that procurement for Federal Assistance Programs conform to the standards set forth in this document and applicable Federal laws.

### 2. APPLICABLE LAWS

The purpose of the Utah Procurement Code (Utah Code Annotated 1953) as stated in Title 63, Chapter 56, Section 1 is to simply, clarify, and modernize the law governing procurement by this state; to ensure fair and equitable treatment of all persons who deal with the procurement system of this state; to provide increased economy in state procurement activities; and to foster effective broad-based competition within the free enterprise system.

The following statutes provide the legislative authority for the requirements related to competitive bidding:

Article 6, Contracts for Public Improvements, 10-7-20 (cities and towns) and Section 17-53-308 (counties), Utah Code Unannotated. See Exhibit G-3.

In reference to 10-7-20 (cities & towns) – If the estimated cost of the proposed improvement exceeds \$25,000, the city or town shall, if it determines to make the improvement, do so by contract let to the lowest responsible bidder after publication of notice at least twice in a newspaper published or of general circulation in that city or town at least five days prior to the opening of bids.

In reference to 17-53-308 (counties) - All buildings for which the estimated cost exceeds \$25,000 shall be repaired, altered, or constructed by contract let to the low responsive and responsible bidder after publication of notice at least once a week for three consecutive weeks in a newspaper of general circulation published in the county, or, if there is no such newspaper, then after posting such notice for at least 20 days in at least five public places in the county.

In reference to 24 CFR Section 3 of the Housing and Urban Development Act of 1968 - The objective is to ensure that recipients of CDBG funds, to the greatest extent feasible, provide opportunities for training and employment to low and very low income people from activities that arise in connection with the planning and carrying out of any project assisted with these funds. Section 3 is more fully explained in paragraph 6 of this section.

### **3. SELECTION PROCEDURES**

A. All procurement transactions, regardless of whether by sealed bids or by negotiation and without regard to dollar value, shall be conducted in a manner that provides maximum open and free competition. Procurement procedures shall not restrict or eliminate competition. Examples of what is considered to be restrictive of competition include, but are not limited to:

- 1) Placing unreasonable requirements on firms in order for them to qualify to do business;
- 2) Noncompetitive practices between firms;
- 3) Organizational conflicts of interest; and
- 3) Unnecessary experience and bonding requirements.

B. The grantee shall have written selection procedures that shall provide, as a minimum, the following procedural requirements:

- 1) Solicitations of offers, whether by competitive sealed bids or competitive negotiation shall:

Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description shall not, in competitive procurement, contain features that unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured, and when necessary, shall set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a "brand name or equal" description may be used as a means to define the performance or other salient requirements of procurement. The specific features of the named brand, which must be met by offers, shall be clearly stated.

Clearly set forth all requirements the bid must fulfill and all other factors to be used in evaluating bids or proposals.

- 2) Awards shall be made only to responsible contractors that possess the potential ability to perform successfully under the terms and conditions of a proposed procurement. Consideration shall be given

to such matters as contractor integrity, compliance with public policy, record of past performance and financial and technical resources.

#### **4. METHODS OF PROCUREMENT FOR PROFESSIONAL SERVICES AND CONSTRUCTION**

The CDBG program recognizes the following four methods of procurement: (a) competitive sealed bids (formal advertising); (b) competitive negotiation; (c) non-competitive negotiation; (d) small purchase procedures used for the procurement of services, supplies or other property. Procurement methods, other than competitive sealed bids, can only be considered after the grantee has contacted and received approval by the grantor agency (State CDBG).

A. The required method of procurement for CDBG funded projects is competitive sealed bids (formal advertising). Sealed bids are publicly solicited and a firm-fixed price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is lowest.

1) In order for formal advertising to be feasible, appropriate conditions must be present, including, at a minimum, the following:

a) A complete, adequate and realistic specification or purchase description is available.

b) Two or more responsible suppliers are willing and able to compete for the grantee's business.

c) The procurement lends itself to a firm-fixed-price contract, and selection of the successful bidder can appropriately be made principally on the basis of price.

B. In competitive negotiation, proposals are requested from a number of sources. Negotiations are normally conducted with more than one of the sources submitting offers, and either a fixed price or cost-reimbursable type contract is awarded, as appropriate. Competitive negotiation may be used if conditions are not appropriate for the use of formal advertising. If competitive negotiation is used for procurement under a grant, the following requirements shall apply:

1) Proposals shall be solicited from an adequate number of qualified sources to permit reasonable competition consistent with the nature and requirements of the procurement. The request for proposal shall be publicized and reasonable requests by other sources to compete shall be honored to the maximum extent practicable.

2) The request for proposal shall identify all significant evaluation factors, including price or cost where required and their relative importance.

3) The grantee shall provide mechanisms for technical evaluation of the proposals received, determination of responsible offers for the purpose of written or oral discussions, and selection for contract award.

4) Award may be made to the responsible offer whose proposal will be most advantageous to the procuring party, price and other factors considered. Unsuccessful offers should be notified promptly.

5) Grantees may utilize competitive negotiation procedures for procurement of architectural/engineering professional services, whereby competitors' qualifications are evaluated and

the most qualified competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation.

C. Noncompetitive negotiation is procurement through solicitation of a proposal from only one source, or after solicitation of a number of sources, competition is determined inadequate. Noncompetitive negotiation may be used when the award of a contract is infeasible under small purchase, competitive bidding (formal advertising) or competitive negotiation procedures. Circumstances under which a contract may be awarded by noncompetitive negotiation are limited to the following:

- 1) The item is available only from a single source;
- 2) Public exigency or emergency when the urgency for the requirement will not permit a delay incident to competitive solicitation;
- 3) The Federal grantor agency authorizes noncompetitive negotiation; or
- 4) After solicitation of a number of sources, competition is determined inadequate.

D. Small purchase procedures are those relatively simple and informal procurement methods that are sound and appropriate for a procurement of services, supplies or other property, costing in the aggregate not more than \$10,000. Grantees shall comply with State or local small purchase dollar limits under \$10,000. If small purchase procedures are used for procurement under a grant, price or rate quotations shall be obtained from an adequate number of qualified sources.

## **5. PROCUREMENT STANDARDS**

These standards do not relieve the grantee of any contractual responsibilities under its contracts. The grantee is responsible, in accordance with good administrative practice and sound business judgment, for settlement of all contractual and administrative issues arising out of procurement entered in support of a grant. These include but are not limited to source evaluation, protests, disputes, and claims. Executive agencies shall not substitute their judgment for that of the grantee unless the matter is primarily a Federal concern. Violations of law are to be referred to the local, State, or Federal authority having proper jurisdiction.

### **A. CODE OF CONDUCT**

Grantees shall maintain a written code or standards of conduct that shall govern the performance of their officers, employees or agents engaged in the award and administration of contracts supported by Federal funds. No employee, officer or agent of the grantee shall participate in selection, or in the award or administration of a contract supported by Federal funds if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when the employee, officer or agent, any member of his immediate family, his or her partner, or an organization that employs, or is about to employ, any of the above, has a financial or other interest in the firm selected for award.

Furthermore, the grantee's officers, employees or agents shall neither solicit nor accept gratuities, favors or anything of monetary value from contractors, potential contractors, or parties to sub-agreements. Grantees may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item or nominal interest value. To the extent permitted by State or local law or regulations, such standards of conduct shall provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the grantee's officers, employees, or agents, or by contractors of their agents.

The grantee shall establish procurement procedures that provide that grantee officials avoid unnecessary or duplicate items by review of proposed procurement actions. Consideration should be given to consolidation to obtain a more economical purchase. Where appropriate, an analysis shall be made of lease versus purchase alternatives, and any other appropriate analysis to determine which approach would be the most economical. To foster greater economy and efficiency, grantees are encouraged to enter into State and local intergovernmental agreements for procurement or use of common goods and services.

**B. CONTRACTING WITH SMALL AND MINORITY FIRMS, WOMEN'S BUSINESS ENTERPRISE AND LABOR SURPLUS AREA FIRMS**

- 1) It is federal policy to award a fair share of contracts to small and minority business firms. Accordingly, affirmative steps must be taken to assure that small and minority business are utilized when possible as sources of supplies, equipment, construction and services. Affirmative steps shall include the following:
  - a) Including qualified small and minority businesses on solicitation lists.
  - b) Assuring that small and minority businesses are solicited whenever they are available.
  - c) When economically feasible, dividing total requirements into smaller tasks or quantities so as to permit maximum small and minority business participation.
  - d) Where the requirement permits, establishing delivery schedules which will encourage participation by small and minority business.
  - e) Using the services and assistance of the Small Business Administration, the Office of Minority Business Enterprise of the Department of Commerce and the Community Services administration as required.
- 2) Grantees shall take similar appropriate affirmative action in support of women's business enterprises.
- 3) Grantees are encouraged to procure goods and services from local project areas.
- 4) Grantor agencies may impose additional regulations and requirements in the foregoing areas only to the extent specifically mandated by statute or presidential direction.

**6. HUD SECTION 3 COMPLIANCE**

24 CFR Part 570.487(d) states, "Section 3 requires that employment and other economic opportunities arising in connection with housing rehabilitation, housing construction, or other public construction projects shall, to the greatest extent feasible, and consistent with existing Federal, State, and local laws and regulations, be given to low and very low-income persons.

In addition to providing specifics about the project and bid procedures, all procurement notices must include a statement similar to that below:

***"This project is funded (or partially funded) through a Department of Housing and Urban Development (HUD) Community Development Block Grant (CDBG). The contractor will be required to comply with all federal labor standards and attendant laws, including the payment of the most current Davis-Bacon wages and compliance with Section 3 to provide employment opportunities for***

*lower income persons. Local, minority and woman owned business owners are encouraged to bid. The lowest responsible bidder will be selected."*

Section 3 compliance applies to projects where the HUD (CDBG) share of the project costs exceed \$200,000; and contractors or subcontractors are awarded contracts that exceed \$100,000; or professional service contract exceeds \$50,000. These grantees, in addition to using the above procurement notice language, must document compliance by completing Exhibit G-8. Recipients with projects that do not exceed these thresholds are not required, but are encouraged to make good faith efforts to comply.

## **7. CONTRACT PRICING**

Grantees shall perform some form of cost or price analysis in connection with every procurement action including contract modifications. Costs or prices based on estimated costs for contracts under grants shall be allowed only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with Federal cost principles.

## **8. GRANTEE PROCUREMENT RECORDS**

Grantees shall maintain records that detail the history of the procurement process. Records should include, information pertinent to rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the cost .

## **9. CONTRACT PROVISIONS**

In addition to provisions defining a sound and complete procurement contract, any recipient of Federal grant funds shall include the following contract provisions or conditions in all procurement contracts and subcontracts as required by the provision, Federal law or the grantor agency.

A. Contracts other than small purchases shall contain provisions or conditions that will allow for administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for appropriate sanctions and penalties.

B. The state will not draw down the final 5% of the contract funds until such time as state staff has reviewed the project. The state reserves the right to withhold an amount greater than 5% if there is any evidence of non-compliance. Furthermore, grantees should advise the contractor that since the federal government has yet to pay out on this portion of the contract there will be no interest earned or paid on this contract as required by state code 13-8-5.

C. All contracts in excess of \$10,000 shall contain suitable provisions for termination by the grantee including manner by which it will be effected and the basis for settlement. In addition, such contracts shall describe conditions under which the contract may be terminated because of circumstances beyond the control of the contractor.

D. All contracts awarded in excess of \$10,000 by grantees and their contractors or sub-grantees shall contain a provision requiring compliance with Executive Order 11246, entitled "Equal Employment Opportunity", as amended by Executive Order 11375, and as supplemented in Department of Labor regulations (41 CFR 60 Part 60-1, Obligations of Contractors and Subcontractors).

E. All contracts and sub-grants for construction or repair shall include a provision for compliance with the Copeland "Anti-Kickback" Act. This Act provides that each contractor or sub-grantee shall be prohibited from inducing, by any means, any person employed in the construction, completion, or repair

of public work, to give up any part of the compensation to which he is otherwise entitled. The grantee shall report all suspected or reported violations to the grantor agency.

F. All construction contracts in excess of \$2,000 awarded by grantees and sub-grantees shall include a provision for compliance with the Davis-Bacon Act. Under this Act contractors shall be required to pay wages to laborers and mechanics at a rate not less than the minimum wages specified in a wage determination made by the Secretary of Labor. In addition, contractors shall be required to submit pay wage sheets not less often than once a week. The grantee shall place a copy of the current prevailing wage determination issued by the Department of Labor in each solicitation and the award of a contract shall be conditioned upon the acceptance of the determination. The grantee shall report all suspected or reported violations to the grantor agency.

G. Where applicable, all contracts awarded by grantees and sub-grantees in excess of \$2,000 for construction contracts and in excess of \$2,500 for other contracts that involve the employment of mechanics or laborers shall include a provision for compliance with Sections 103 and 107 of the Contract Work Hours and Safety Standards Act. Under Section 103 of the Act, each contractor shall be required to compute the wages of every mechanic and laborer on the basis of a standard workweek of 40 hours. Work in excess of a standard workweek is permissible provided that worker is compensated at a rate of not less than 1 ½ times the basic rate of pay for all hours worked in excess of 40 hours in the work week. Section 107 of the Act is applicable to construction work and provides that no laborer or mechanic shall be required to work in surroundings or under working conditions that are unsanitary, hazardous, or dangerous to his health and safety as determined under Secretary of Labor. These requirements do not apply to the purchases of supplies or materials.

H. The contract shall include notice of grantor agency requirements and regulations pertaining to reporting and patent rights under any contract involving research, developmental, experimental or demonstration work with respect to any discovery or invention which arises or is developed in the course of or under such contract, and of grantor agency requirements pertaining to copyrights and rights in data.

I. All negotiated contracts (except those awarded by small purchase procedures) awarded by grantees shall include a provision to the effect that the grantee, the Federal grantor agency, the Comptroller General of the United States, or any of their duly authorized representatives, shall have access to any books, documents, papers, and records of the contractor which are directly pertinent to that specific contract, for the purpose of making audit, examination, excerpts, and transcriptions. Grantees shall require contractors to maintain all required records for three years after grantees make final payment and all other pending matters are closed.

J. Contracts shall recognize mandatory standards and policies relating to energy efficiency that are contained in the International Energy Conservation Code.

K. The State Division of Community Development is permitted by Federal Procurement Policy to require changes, remedies, changed conditions, access and record retention and suspension of work clauses.

L. Additionally, the State requires all contractors to be licensed with the state and have a performance bond. It is also strongly suggested that a bid bond be obtained. **It is the responsibility of the grantee to verify that contractors are licensed in the State of Utah.**

## **10. CONTRACT ADMINISTRATION**

Grantees shall maintain a contract administration system ensuring that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

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